LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U. S.
FILED
FEB 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1240

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Petitioner,

vs.

ANNE B. ZIPES, ET AL., DARLENE PRESTON, ET AL., DARLENE PRESTON, INDIVIDUALLY, ET AL., BONNIE PULSKAMP, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GILBERT FELDMAN,
BARBARA JANE HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioner.

Gunthorp-Warren Printing Company, Chicago • 346 1717 56

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
1. Accommodation of Title VII and the Duty of Fair Representation	9
2. The Seniority Conflict	13
3. The Acquiescence in Union Representation	16
4. The Right of Class Members to "Opt Out"	17
Conclusion	18
Appendix I—District Court Orders	A1
Appendix II—Court of Appeals' Decision	A4
Appendix III—Statutes Involved	A18

TABLE OF CITATIONS.

Cases.

Bowe v. Colgate Palmolive Co., 416 F. 2d 711 (7th Cir. 1969)	10
Eisen v. Carlisle, 479 F. 2d 1005, 1014 (2d Cir. 1973)	12
Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U. S. 661 (1946)	16, 17
Ford Motor Co. v. Huffman, 345 U. S. 330 (1952)	9
Humphrey v. Moore, 375 U. S. 335 (1963)	10, 14, 15, 17, 18
International Chemical Workers v. Planters Mfg. Co., 259 F. Supp. 365 (N. D. Miss. 1966)	10

Kordewick v. Brotherhood of R. R. Trainmen, 181 F. 2d 963, 966 (7th Cir. 1950) 16

Local 186 v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284, 1294 (N. D. Ind. 1969) 10

Pyzynski v. New York Central, 421 F. 2d 854, 859-860 (2d Cir. 1970) 16

Railroad Trainmen v. Howard, 343 U. S. 768 (1951) 9, 15

Snyder v. Harris, 394 U. S. 332 (1969) 12

Steele v. Louisville and Nashville R. R. Co., 323 U. S. 192 (1944) 9, 15

Vaca v. Sipes, 385 U. S. 895 (1967) 10, 14

Western Addition Community Organization v. NLRB, 45 F. 2d 917 (D. C. Cir. 1973), cert. filed 10-27-73 .....9, 13

Statutes.

28 U. S. C. § 1254(1) 2

Civil Rights Act of 1964, Title VII, Section 703(c) 3

Civil Rights Act of 1964, Title VII, Section 703(c)(1) ... 10

Civil Rights Act of 1964, Title VII, Section 703(c)(2) ... 10

Civil Rights Act of 1964, Title VII, Section 703(c)(3) ... 10

Civil Rights Act of 1964, Title VII, Section 706(d) 14

Civil Rights Act of 1964, Title VII, Section 706(g) 14

Federal Rules of Civil Procedure, Rule 23 .....7, 12, 13

Federal Rules of Civil Procedure, Rule 23(b)(2) 6, 7, 17

Federal Rules of Civil Procedure, Rule 23(b)(3) 8, 17

Federal Rules of Civil Procedure, Rule 23(e) 18

Labor Management Relations Act 13

Labor Management Relations Act, Section 7 13

Railway Labor Act 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .....

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO.

Petitioner,

vs.

ANNE B. ZIPES, ET AL., DARLENE PRESTON, ET AL., DARLENE PRESTON, INDIVIDUALLY, ET AL., BONNIE PULSKAMP, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on December 21, 1973, in consolidated cases numbered 72-1335, 72-1336, 72-1399 and 72-1503.

OPINIONS BELOW.

The District Court did not issue an opinion. Its final orders in the three cases before it are reprinted in Appendix I herein. The opinion of the Court of Appeals is reprinted in Appendix II herein.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 21, 1973. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Can a Union be denied the authority to represent its members, terminated allegedly in violation of Title VII of the Civil Rights Act of 1964, in a Title VII action, while there is imposed upon the Union a legal duty of "fair representation" to represent and protect its members against such allegedly discriminatory action by the employer?

2. Is a Union rendered an inadequate representative of its members, terminated allegedly in violation of Title VII, on the ground that the interests of the Union's nonterminated members conflict with the interests of the terminated members because of their relative rights under the seniority system?

3. Can Union members, terminated allegedly in violation of Title VII, demand that the Union represent them and protect their rights, acquiesce in and accept the benefits of such Union representation in a Title VII action for 2 years, and then, because of their disapproval of a settlement agreement recommended by the Union for Court approval, object to the adequacy of the Union as a class representative and sue the Union for breach of its duty of fair representation?

4. If a Union, seeking to fulfill its duty of fair representation, enters into a settlement agreement of a class action it has brought as representative of its members, terminated allegedly in violation of Title VII, can dissenting members in the class being represented exclude themselves from the class?

STATUTES INVOLVED.

Reprinted in Appendix III herein are Rule 23 of the Federal Rules of Civil Procedure for the United States District Courts and Section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(c).

STATEMENT OF THE CASE.

The Petitioner Union ("ALSSA") represents flight attendants in the air line industry, including those employed by American Airlines, Inc. ("American") and Trans World Airlines, Inc. ("TWA"). During the 1960's the industry generally employed various customs and practices applicable only to female flight attendants which denied them the opportunity to a permanent career as a flight attendant. Female flight attendants were terminated upon marriage or upon attaining an age which ranged from 26 to 32, depending on the carrier. By 1969 ALSSA had achieved the elimination of these practices. However, the industry generally, including the two carriers in the instant case, American and TWA, continued to resist ALSSA's bargaining demands that the right reserved by the companies to terminate for pregnancy be discarded. (Supp. App. II, pp. 150-151, 167)[1]

By early 1970, a number of grievances had been filed by female flight attendants (American stewardesses and TWA hostesses) protesting their termination for pregnancy. The first such grievance to reach the arbitration level involved an American stewardess, Darlene Preston, who had been terminated in January, 1970. In conversations with both the ALSSA President and its counsel, she adamantly demanded that ALSSA represent her and take her case to arbitration. On advice of its counsel that, pursuant to its duty of fair representation, ALSSA was legally obligated to represent members terminated for pregnancy,

1. The record in the court below consists of three volumes: Appendix (App.); Supplemental Appendix Volume I (Supp. App. I); and Supplemental Appendix Volume II (Supp. App. II).

but that arbitration would prove futile[2] and Title VII of the Civil Rights Act of 1964 provided the appropriate means of pursuing the issue, the Union decided to follow that route. (Supp. App. II, pp. 151, 194, 197-198, 204, 318-322)

On March 30, 1970, the ALSSA President wrote similar letters to both American and TWA asserting that the practice of termination for pregnancy was illegal and demanding that it be abolished and that pregnancy leaves be provided in lieu thereof and warning that ALSSA would take unilateral action upon failure of the carriers to comply. Both carriers rejected ALSSA's demand. (Supp. App. I, pp. 107-108; Supp. App. II, pp. 151-152, 318-319)

ALSSA held a meeting on April 21, 1970, which was attended by stewardess Darlene Preston and six other stewardesses who had been terminated for pregnancy. They demanded that ALSSA represent them and handle the prosecution of their grievance claims. The ALSSA counsel advised them that ALSSA would not seek arbitration but would file an EEOC charge and then a lawsuit in an effort to obtain their reinstatement. The seven stewardesses agreed to this procedure. This original group augmented by additional American stewardesses and TWA hostesses who had been terminated for pregnancy and who informed ALSSA representatives that they desired to participate in the litigation ALSSA was about to institute, became the named class plaintiffs in the complaints filed by ALSSA against the two carriers. (Supp. App. II, pp. 152, 311)

On June 1, 1970, ALSSA filed charges against the two carriers with the EEOC; on July 31, 1970, the EEOC issued "right to sue" letters, and on August 18, 1970, ALSSA filed similar actions against the two carriers. (Supp. App. II, pp. 152-153) ALSSA brought the complaints both in its own behalf

2. American had expressly reserved the right to terminate for pregnancy in the collective agreement when ALSSA was successful in eliminating the termination for marriage provision; TWA terminated for pregnancy as a matter of practice.

as an "aggrieved party", whose duty of fair representation to the class of individual plaintiffs was impaired by the carriers' illegal actions and conduct, and in behalf of its members within the class, for whom it was the certified bargaining representative pursuant to the terms of the Railway Labor Act.[3]

In October, 1970, during negotiations for new contracts with each of the two carriers, agreements were reached providing for pregnancy leaves in lieu of termination for pregnancy. These agreements were to be effective beginning with the reopening dates of the respective preceding contracts. ALSSA then continued to pursue the litigation on behalf of those members who had been terminated for pregnancy prior to those dates. (Supp. App. II, 153, 164, 346)

In July, 1971, settlement agreements were reached by officials of the two carriers, ALSSA officials and their respective counsel. (Supp. App. II, pp. 153-154, 315, 326-328) They essentially provided for reinstatement of the class (Supp. App. I, pp. 110, 112, 137; Supp. App. II, pp. 155-157, 329) without back pay (Supp. App. II, pp. 155) and with seniority accumulated up to date of termination. (Supp. App. II, pp. 157-158)

ALSSA was aware at this time of two essentially disparate groups within the pregnancy class. The majority group desired reinstatement as early as possible because prolonged litigation would leave them with only an esoteric right to return to work, due to personal and family decisions made and implemented during the interim. However, a minority group was interested in "going for broke" with the hope that a sizable money judgment would be achieved at the end of the line. In opting for the settlement without back pay, ALSSA made a conscious decision in favor of the former group. ALSSA believed, upon advice of counsel, that this election was entirely consistent with and in

3. The complaints defined the proposed class as female flight cabin attendants currently employed by the carrier and/or employed by the carrier at any time since July 2, 1965, who had been, desired to become and/or in the future would desire to become pregnant. (Supp. App. I, pp. 1-11)

accordance with its duty of fair representation. (Supp. App. II, pp. 168, 325, 337-338)

On July 16, 1971, the District Court entered orders defining the classes to consist of stewardesses or hostesses who had been removed from the payroll because of pregnancy between July 2, 1965 and the effective date of the respective agreements granting pregnancy leaves, providing for notice to the class and setting for August 30, 1971, a hearing to determine the fairness of the settlement agreements between ALSSA and the two carriers. Notice to the class, including copies of the settlement agreements, was then disseminated. (Supp. App. I, pp. 27-37; Supp. App. II, pp. 342-343) That hearing was stayed, however, during an unsuccessful attempt by the EEOC to intervene of right in these suits. The EEOC appealed the adverse decision of the District Court and the Court of Appeals on January 18, 1972 affirmed. (Reported at 455 F. 2d 101)

On January 18, 1972, the District Court ordered a hearing on the settlement agreements for March 10, 1972. Notices were then distributed to the class. (Supp. App. I, pp. 54, 58) On February 24, 1972, the District Court ordered a supplemental notice that an order finding the action to be a Rule 23(b)(2) class action would be sought at the hearing, that orders and judgments would therefore bind all members of the class, and that objection thereto could be made at the hearing. This additional notice was distributed to the class. (Supp. App. I, pp. 59-60)

On February 28, 1972, Darlene Preston filed a new law suit in the District Court against American, ALSSA and its president (the "Preston Action"). (Supp. App. I, pp. 60-68) She designated the plaintiffs as herself, individually, and in a representative capacity on behalf of each member of a class of persons who are, have been or will in the future be employed by American. The subject matter of the suit was the policy of American to terminate stewardesses for pregnancy. In Count I of her complaint, she sought judgment against American for

violation of Title VII. In Count II, she alleged that ALSSA had violated its duty of fair representation under the Railway Labor Act by acquiescing and/or joining in the discriminatory practices and policies of American and by failing to protect the female members of the company from these discriminatory practices and policies. Count II sought judgment against ALSSA for violation of Title VII. The Preston action, filed ten days prior to the scheduled hearing on the settlement agreements, was the first challenge to the adequacy of ALSSA's representation of the pregnancy class since ALSSA had first acquiesced in Preston's demand, approximately two years earlier, that ALSSA represent her. (Supp. App. II, p. 196)

Hearings on the fairness and adequacy of the settlement agreements and on objections and motions[4] were held by the District Court at five sessions from March 10 to 17, 1972.

At the conclusion of the hearings, the District Court entered orders finding the class actions to be governed by Rule 23(b)(2), approving the settlement agreements and holding that they were binding on all members of the class. (Supp. App. I, pp. 88-90) The District Court also granted motions to dismiss the Preston action. (Supp. App. I, pp. 91-93)

On appeal,[5] the Court of Appeals reversed. Its holding was essentially as follows:

(A) ALSSA is not an adequate representative of the pregnancy class as required under Rule 23 essentially because

4. Several notices of exercise of right to "opt out" had been filed shortly prior to the hearing. (Supp. App. I, pp. 69-70, 73) Further, objections were filed to the settlement and to the class determination made by the District Court. (Supp. App. I, pp. 78, 84)

5. Four notices of appeal were filed by: Anne Zipes and two other members of the TWA class; Darlene Preston and thirty-three other members of the American class, Bonnie Pulskamp and five other members of the American class, who had filed a separate action against American in the United States District Court, Central District of California, which action had been stayed pending hearings in subject action; and Darlene Preston and twenty-two other individuals, who appealed from the dismissal of the Preston action. (Supp. App. I, pp. 94-96)

ALSSA's on-the-line members have seniority interests in conflict with members who have been terminated for pregnancy.

(B) It is not necessary to accomodate ALSSA's authority and responsibility under the Railway Labor Act with its authority and responsibility under Title VII.

(C) The District Court's approval of the settlement agreements should be set aside on the ground that ALSSA, being an inadequate representative of the pregnancy class, was not authorized to enter into the compromises.[6]

(D) As to the discharged members of the pregnancy class, the action is properly a (b)(3) class action, and class members have the right to "opt out".

(E) The Preston action, *inter alia* alleging failure to afford fair representation and conduct violative of Title VII by ALSSA, is to be reinstated.

REASONS FOR GRANTING THE WRIT.

The issues presented in this case arise from a situation of common occurrence in the labor arena. A minority within the union membership are illegally discriminated against by the employer. The union in collective bargaining negotiations attempts to eliminate the right of the employer to discriminate but the employer is recalcitrant and, only a minority group being affected, the union lacks the bargaining power to achieve its goal. Lacking contract language, the union also is impotent to achieve a remedy through the grievance and arbitration procedure. How does it represent its members? What are the governing standards? Until the issuance of the decision below, one would have thought in applying the fair representation doctrine that a Title VII action on behalf of its members would be appro-

6. The Court below did not disagree with the finding of the District Court that the compromises were fair; rather, it implied agreement with the District Court on this point, setting forth in its opinion some of the rationale offered by ALSSA in support of its decision to enter into the compromises.

priate. But now, no union in the country can know what to do. For the decision below is in fundamental and irresoluble conflict with the fair representation decisions issued by this Court. It also is in conflict with a recent decision of the Court of Appeals for the District of Columbia,[7] in which a petition for writ of certiorari is pending.

1. Accommodation of Title VII and the Duty of Fair Representation.

The Court below simply sidestepped the fact that both Title VII and the fair representation cases deal with the same subject matter, to-wit: invidious discrimination on the basis of race, sex and other capricious factors. It ignored ALSSA's plea that the standards for a union under one must be the same as the standards for a union under the other and insisted upon treating Title VII independently of the duty of fair representation. The result is to confront unions with a situation akin to a fork in the road with arrows pointing both to the right and the left. Unless this Court reconciles the standards for unions under these two fields of law, labor unions will be consigned to a state of chaos.

Under the fair representation cases, a union has a duty to the minority of those it represents not to permit discrimination in employment based upon invidious factors. *Steele* v. *Louisville and Nashville R. R. Co.*, 323 U. S. 192 (1944) This duty has been extended to minority employees outside the class of employees the union is authorized to represent. *Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1951). However, discrimination based upon relevant as opposed to invidious factors is not impermissible. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1952) The fact that employees represented by the union have conflicting interests, as when seniority is involved, does not alter

7. See discussion of *Western Addition Community Organization* v. *NLRB*, 45 F. 2d 917 (D. C. Cir. 1973), cert. filed 10-27-73, *infra*.

the union's duty of fair representation. *Humphrey* v. *Moore*, 375 U. S. 335 (1963). When an employee is terminated for improper reasons, the union's duty of fair representation does not cease; rather the union has an affirmative obligation in good faith to take positive action in fulfillment of its duty as the employee's representative. Upon failure to do so, the union is subject to suit. *Vaca* v. *Sipes*, 385 U. S. 895 (1967).

The enactment of Title VII was never thought to change the duty of fair representation until the Court below clouded the question. Title VII merely codified what this Court had previously required of unions. Section 703(c)(1) made it unlawful for a union to discriminate against any person because of his race, color, religion, sex, or national origin. Section 703(c)(2) made it unlawful for a union to segregate or classify its membership in such a way as to permit discrimination based upon these same invidious factors.[8] Section 703(c)(3) made it unlawful for a union to cause or attempt to cause an employer to discriminate for reasons prohibited under the enactment.

The significance of Title VII as far as unions were concerned was that it brought employers into the statutory scheme of proscribed conduct previously limited to unions. It gave unions a remedy not previously available where the union was acting in good faith, the employer was bent upon discriminating and the union lacked the bargaining power to force the employer to cease its conduct. It empowered the union to bring suit against the employer.[9]

The Court below conceded that a union can sue the company to vindicate the civil rights of its members. It continued:

---

8. Hence, it would follow that a union could not classify its membership on the basis of whether or not they had been terminated for invidious reasons, restricting its duty of representation only to those who had not been so terminated. The effect is to incorporate the *Vaca* v. *Sipes* principle into Title VII.

9. *Local 186* v. *Minnesota Mining & Mfg. Co.*, 304 F. Supp. 1284, 1294 (N. D. Ind. 1969); *International Chemical Workers* v. *Planters Mfg. Co.*, 259 F. Supp. 365 (N. D. Miss. 1966).

> "But except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested in the ordinary way."

Three errors are contained in this exposition. First, here as throughout the opinion, the Court equates two very distinct and separable concepts, the authority of a union to represent a class of its members and the authority of the union to compromise the rights of individual members of that class. We are dealing here only with the former; the latter is discussed *infra* under the title "The Right Of Class Members To Opt Out".

Secondly, the Court neatly distinguishes between Title VII rights against discrimination and rights arising out of collective bargaining contracts. However, when this abstraction is applied in the context of the reality of the representation question and the union's duty of fair representation, the distinction becomes esoteric and meaningless. (Concededly, the distinction is not meaningless for other purposes including the right to opt out.) An employee subjected to illegal discrimination does not classify his problem as either a Title VII or a collective bargaining contract issue. In practice, he does what Darlene Preston did in this case. He comes to the union and demands representation. He does not care how the union solves his problem so long as it solves it. Whether to arbitrate or to bring suit[10] is left to the bargaining representative. If a union were to adhere to the holding of the Court below and tell the member that arbitration was futile because of lack of contract language and the union was an improper class representative and therefore could not

10 The 7th Circuit has held that a suit under Title VII "is necessarily a class action. . ." *Bowe* v. *Colgate Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). Accordingly, if the union sues for one member demanding representation, it is initiating action on behalf of the entire class of its affected members.

represent him, the member assuredly would find a lawyer who would promptly bring a Title VII class action against both the employer and the union, alleging *inter alia* a failure of the union to afford the member fair representation. (That is exactly what Darlene Preston implied she would do in this case if ALSSA had not acceded to her demand for representation.)

The union is left in an impossible predicament. The fair representation cases impose a duty to represent the member; the decision of the Court below deprives the union of the only tool it has to fulfill that duty but permits the union to be sued for failure to afford fair representation. (As noted in the statement of the case, the Preston action for alleged failure of ALSSA to afford fair representation was reinstated on remand.)

Thirdly, the Court relies upon Rule 23 to disqualify the union as the class representative instead of basing its decision upon a reconciliation of Title VII and the fair representation cases. In doing so, the Court is employing a procedural provision to affect and govern substantive rights. This is an improper use of Rule 23. *Snyder* v. *Harris*, 394 U. S. 332 (1969); *Eisen* v. *Carlisle*, 479 F. 2d 1005, 1014 (2d Cir. 1973).

It is noted that the substantive rights that are thereby adversely affected are not only those of the union. In the instant case, the Court has ruled to the detriment of the rights of the majority of the pregnancy class who desired representation by ALSSA and who welcomed the settlement agreements achieved by ALSSA; these union members are deprived of the benefits of "fair representation." By upsetting the settlement agreements the Court has totally undermined the interests of the majority. The settlement agreements had achieved the majority's primary objective—expeditious reinstatement. Not only does the Court take back from the majority the very relief it sought; the Court sets the stage on remand for representation of the majority by minority class members whose fundamental objective—litigating to a conclusion in

search of money judgments—is squarely opposed to the goal of the majority.

Finally, the confusing standard promulgated by the Court below, due to its refusal to accomodate the duty of fair representation with Title VII and Rule 23, is in conflict with the standard adopted by the Court of Appeals for the District of Columbia in *Western Addition Community Organization* v. *NLRB*, 45 F. 2d 917 (D. C. Cir. 1973), cert. filed 10-27-73. That Court recognized the necessity of reconciling Title VII with a labor act covering the same subject matter, the Labor-Management Relations Act. The union was taking certain steps allegedly to remedy discriminatory practices against a minority group of blacks within its membership. The issue was, when could the minority group take independent action which might conflict with the union action? The Court imposed the following test to determine whether the union was fulfilling its duty of fair representation: "whether the union was actually remedying the discrimination to the fullest extent possible, by the most expedient and efficacious means." Only when the union failed to meet that standard, the Court stated, could discriminatees attempt to achieve their objective by individual activities which would then be protected under Section 7 of The Labor Act. The only expedient and efficacious means available to ALSSA to assist the pregnancy class was to represent them in the Title VII suit. Hence, under this standard, ALSSA must be empowered to represent its members in a Title VII suit.

2. The Seniority Conflict.

In disqualifying ALSSA as an adequate representative of the pregnancy class on the basis of allegedly conflicting seniority interests between members of the pregnancy class, on the one hand, and on-the-line stewardesses, on the other hand, the Court below misconceives the nature of relative seniority rights under a union contract. Each employee's relative seniority rights have meaning only when measured against those of all of

the other employees; hence, every employee's interest conflicts with that of every other employee.[11] This Court directly confronted the seniority conflict problem in the context of a labor contract dispute in *Humphrey* v. *Moore, supra.* Recognizing that "Conflict between employees represented by the same union is a recurring fact", this Court held that it is a union's responsibility to represent the conflicting interests and exercise good faith in resolving the dispute. The clear meaning of this Court's *Humphrey* doctrine has been severely muddled by the misguided treatment of seniority by the Court below.

Despite the fact that seniority conflicts exist between all union members, the Court below attempts to draw an artificial line between terminated members and those currently employed; e.g., the pregnancy class against the on-the-line stewardesses.

The Court then equates the union with the majority group, the on-the-line stewardesses. ("They, who are presently presumably in control of ALSSA . . ."), and based on the antagonistic seniority interests between the working majority and the terminated minority, it disqualifies the union from representing the minority. This holding is manifestly in conflict with *Vaca* v. *Sipes, supra,* which extended the duty of fair representation to members whose employment had been terminated. Further, the natural extension of reasoning such as this would be to eradicate the duty of fair representation and the recognition of the union as an entity with an affirmative

11. This is the reason that ALSSA argued to the Court below the necessity of a compromise on seniority which was fair and consistent with ALSSA's duty of fair representation should the case be settled short of final adjudication. Lacking such adjudication, there was no way to predict the rightful place of anyone on the seniority list due to the following unresolved legal problems: (1) Legal uncertainty as to the carriers' general liability under the Act; (2) Potential defeat of 90% of the individual claims as being outside of the statute of limitations (Section 706(d) of the Act); and (3) Possible defeat of individual claims because they were not discharged on account of sex (Section 706(g) of the Act) but resigned or were discharged for dishonesty and refusal to comply with company rules in concealing pregnancy and flying while pregnant.

role to play under Title VII. For in almost every case involving invidious discrimination, it is a minority that is subjected to the discrimination. It was in response to this reality that this Court formulated the "duty of fair representation" in the *Steele* and *Howard* cases, and it was in response to this reality that Title VII was enacted and unions held accountable under it. Manifestly, no one ever thought a duty of fair representation or civil rights legislation was needed to protect the majority.

Moreover, no class action could ever be maintained involving a group of terminated employees should the logic of the Court below stand as unchallenged law. The reason is that the seniority conflict relied upon by the Court below exists between every member of the class of terminated employees; upon reinstatement, the rights of each would be relative to the rights of the others.[12] Hence, if the union is to be disqualified as an adequate representative, on the basis of the same reasoning, every member of the class would be disqualified. The inescapable conclusion would be that no one could represent the class or even any two members of the class.

However, if this Court's *Humphrey* v. *Moore* doctrine is applied to Title VII, it will resolve the problem by permitting the union to act as the representative of the class.

---

12. In connection with this consideration, it is again noted that the 7th Circuit has held that all actions brought under Title VII are necessarily class actions. See note 10, *supra*. In this case, the following potential disputes between members of the pregnancy class typify what might be anticipated reflecting their divergent seniority interests: (1) Those terminated in 1970 might resist the claims of those terminated earlier, asserting the statute of limitations; by eliminating them, those terminated at the end of the time period could better their seniority positions by blocking accrual of seniority rights from 1965-1969; (2) Those who grieved or otherwise protested their termination might resist the claims of those who were passive upon termination or who resigned; and (3) Those who complied with carrier rules by giving immediate notice of their pregnancy, leading to immediate termination, might resist the claims of those terminated for dishonesty and concealment of pregnancy. See note 11, *supra*.

3. The Acquiescence in Union Representation.

The decision of the Court below is manifestly in conflict with the principle adopted by this Court in *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 327 U. S. 661 (1946). This Court held that a union could obtain authority to represent employees and to settle their grievances "within well established rules relating to unincorporated organizations . . . as well as by usage or custom. . ." Referring to the obligations of the employee when the union and carrier seek to negotiate a settlement of his grievance, this Court further stated: "Not only is he required to take affirmative steps. His failure to do so may result in loss of his rights." The same result occurs, the opinion indicated, under "the ordinary law of agency", which "attributes authority to a representative to act when the principal stands by . . . and permits the third person to act". So an employee may not stand by, allow his claim to be "thrashed out" before the board, "and then come in for the first time to assert his individual rights."

A similar conflict exists between the decision of the Court below and a decision of the Second Circuit where the *Burley* principle was applied. *Pyzynski* v. *New York Central*, 421 F. 2d 854, 859-860 (2d Cir. 1970).[13]

In the instant case, Darlene Preston grieved through ALSSA her January, 1970 discharge. When American denied her grievance she insisted that ALSSA process it to arbitration. In April, 1970, Preston and the other named plaintiffs agreed to ALSSA's selection of a Title VII suit as the proper method of prosecuting their claims. They not only authorized ALSSA to represent them; they demanded as much as their legal right. They permitted ALSSA to file the charges with the EEOC on June 1, 1970 and to file the lawsuits on August 18, 1970. In August, 1971 the entire pregnancy class, including both American stewardesses and TWA hostesses, received notices, includ-

13. The decision of the Court below further would appear to be irreconcilable with its earlier decision in *Kordewick* v. *Brotherhood of R. R. Trainmen*, 181 F. 2d 963, 966 (7th Cir. 1950).

...ign copies of the terms of the compromises. In February, 1972 notices were again distributed to the entire class. Yet, no objection to the adequacy of ALSSA's representation or authority to act was made until February 28, 1972, two years after the ALSSA representation began and ten days prior to the hearing on the compromises, when Darlene Preston filed her complaint in the Preston action, seeking to convert ALSSA's status from that of her representative to that of a defendant. In permitting ALSSA's adequacy as a representative to be challenged in this situation, the Court below was acting in clear derogation of the *Burley* doctrine.[14]

4. The Right of Class Members to "Opt Out."

The right of class members to exclude themselves from the actions originally brought is an entirely separate issue from the adequacy of the class representative. The Court below would appear to have recognized this distinction since it divided its treatment of the legal issues into two sections each with appropriate headings describing these two issues.[15]

The Court below determined that Rule 23(b)(3) was applicable and that individual class members accordingly were entitled to opt out. ALSSA agrees.[16] Although *Humphrey* v.

14. The Court below made the following curious statement which seems totally incomprehensible under the circumstances:

> "We have no doubt that even in a class action subject to (b)(3), situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and 'spoiling' a settlement obtained by such efforts. Nothing revealed in this record puts these cases in that posture."

15. The Court below confuses the issue, however, when, in the adequacy of representation portion of its opinion, it repeatedly equates these two concepts.

16. Both before the District Court and the Court below, the carriers contended that Rule 23(b)(2) governed and that all members would be bound by the judgment. ALSSA argued only that it was a proper representative of the pregnancy class, taking no position on the question of opting out.

Moore would mandate a different result were the disputed rights arising from a labor contract rather than a civil rights statute. ALSSA visualizes no conflict with the union's duty of fair representation should there be a right to opt out. Since this case involves a substantive civil right emanating from a federal statute, ALSSA believes that it would be improper to apply *Humphrey* v. *Moore* so as to empower a union to bind individual discriminatees who desire to pursue their rights alone.

However, the question remains how the right to opt out affects and is to be reconciled with the union's duty of fair representation. In ALSSA's judgment, an election by a class member to opt out should end the union's duty of fair representation to that individual. In the case of a settlement agreement as in the instant case, should the District Court approve the agreement pursuant to Rule 23(e), the union's obligations should cease since the class members will either accept the settlement or opt out.[17]

CONCLUSION.

For the reasons stated, ALSSA respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

GILBERT FELDMAN,
BARBARA JANE HILLMAN,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioner.

17. However, the union should be retained as a party, should individuals opt out. As the representative of all of its members, the union must be in a position to represent their interests in the event of a non-adjudicated settlement between an individual member and the employer involving seniority rights.

APPENDIX A.

JUDGMENT ORDER IN NO. 70 C 2071.

(Entered March 17, 1972)

On this 17th day of March, 1972, the above entitled action having come on regularly to be heard, pursuant to the order entered herein dated February 3, 1972, upon an Agreement of Compromise and Settlement (the "Agreement") and it appearing that due notice of said hearing was given in accordance with the aforesaid order, and all parties having appeared by their attorneys of record, the Court having considered both the Agreement and statements and affidavits in opposition thereto by some members of the class and their counsel, and an opportunity to be heard having been given to all interested persons desiring to be heard:

It is ordered, adjudged and decreed that:

1. The Court has jurisdiction over the subject matter of the action and the parties hereto, including all former hostesses who were removed from the payroll of defendant between July 2, 1965, and July 31, 1969, because of pregnancy. They are the members of the class. Plaintiffs are adequate representatives and have adequately represented them. The prosecution of this action as a class action is found to have been proper for all purposes of these proceedings. This action is a Rule 23(b)(2) class action. This judgment is binding upon and adjudicates the rights of the members of the class with respect to all claims or causes of action arising out of, under, or in connection with any matter or transaction referred to or suggested by the complaint.

2. On February 8, 1972, notice of the hearing and a copy of the memorandum of understanding attached to the Agreement was mailed to each member of the class at her last known ad-

dress, and on February 25, 1972, a supplemental notice was so mailed which stated that any member of the class may show cause why this lawsuit brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure should not be adjudicated to be a Rule 23(b)(2) class action, and the Court finds that due and adequate notice of the hearing has been given and full opportunity to be heard has been afforded to all parties and persons in interest.

3. The Court has examined and approves and hereby incorporates for all purposes and makes a part of this judgment the Agreement, which is attached in its entirety hereto as Exhibit A, and which was entered into by and between the parties to this action on July 14, 1971, including the Memorandum of Understanding attached thereto. The Agreement was arrived at fairly and in good faith and is found to be fair, reasonable and adequate for all parties and for all members of the class. The parties hereto are ordered and directed to implement the Agreement.

4. This judgment order and the Agreement shall not constitute any evidence or admission by the defendant that any unlawful act has been committed, and shall not be deemed to create any inference that there is any liability therefore. Defendant does not admit, either expressly or by implication, that it is subject to any liability whatsoever by reason of any of the matters complained of in this action and, on the contrary, expressly denies and disputes the existence of any such liability.

5. This action is hereby dismissed on the merits and with prejudice as against the defendant, its personal representatives, subsidiaries, past and present officers, directors, shareholders, employees and agents, and all of them are hereby discharged from any and all liability, claims, demands, or causes of action in law or in equity, arising under federal, state or local law, alleged or which could have been alleged in the complaint, and all claims or causes of action as to all members of the class

arising or which may arise out of, under, or in connection with any matter or transaction referred to or suggested by the complaint in this action. This judgment shall be final and conclusive with respect thereto.

6. Jurisdiction is retained for the purpose of enabling any party to this final judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of the provisions of this final judgment and of the provisions of the Agreement.

Enter:

/s/ J. S. PERRY,
Judge.

Dated: March 17, 1972

JUDGMENT ORDER IN No. 70 C 2069.
(Entered March 17, 1972)

[The judgment order entered in the American action is similar in all respects to the order set out immediately above, and is therefore omitted from this Appendix.]

ORDER IN No. 72 C 498.
(Entered March 20, 1972)

Plaintiffs' motion to amend complaint is hereby denied. Defendants' motion to dismiss is hereby granted.

/s/ PERRY

APPENDIX II.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

Nos. 72-1336, 72-1503
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al.,
Plaintiffs,
v.
AMERICAN AIRLINES, INC.,
Defendant,
DARLENE PRESTON, et al.,
Appellants in No. 72-1336,
BONNIE PULSKAMP, et al.,
Appellants in No. 72-1503.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
J. SAM PERRY,
Judge.
70 C 2069

No. 72-1335
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al.,
Plaintiffs,
v.
TRANSWORLD AIRLINES, INC.,
Defendant,
PATRICIA A. SANTINI, et al.,
Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
J. SAM PERRY,
Judge.
70 C 2071

No. 72-1339
DARLENE PRESTON, et al.,
Plaintiffs-Appellants,
v.
AMERICAN AIRLINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
J. SAM PERRY,
Judge.
72 C 498

ARGUED SEPTEMBER 11, 1973—DECIDED DECEMBER 21, 1973

Before KILEY, FAIRCHILD, and STEVENS, *Circuit Judges*.

FAIRCHILD, *Circuit Judge*. These appeals from a sequel to *Air Lines Stewards, etc., Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101 (7th Cir., 1972), and some of the background facts appear there. That decision, affirming denial of intervention by EEOC, was filed January 18, 1972. Thereafter notices of hearing in the district court on approval of the settlement, referred to at 455 F. 2d 103, were mailed to members of the class in each action. A hearing was held. Plaintiff union (ALSSA) and the defendants supported the settlement, and the support of several individual members of the class was made known. Objections on behalf of dissatisfied members of the classes, including several named individual plaintiffs, were filed or made known at the hearing.

On March 17, 1972, a judgment was entered in each action (American Airlines, Inc., and Trans World Airlines, Inc., being the respective defendants), approving the settlement, ordering it implemented, and dismissing the action on the merits. Appeals were filed by members of the classes, including certain named plaintiffs, in each case. A related action against American and ALSSA was also dismissed, and those plaintiffs appealed.

Appellants contend that the district court should not have approved the settlements because ALSSA (certified bargaining agent for airlines cabin attendants under the Railway Labor Act), which negotiated the settlements disposing of the interests of members of the class, had interests antagonistic to them. Appellants also maintain that they were entitled to exclude themselves from the action and avoid the binding effects of the judgments. Other arguments are urged in addition.

Until October, 1970, defendant airlines followed the practice of discharging, permanently, a stewardess who became preg-

nant. On August 18, 1970, ALSSA and 12 stewardesses who had lost their jobs under this policy commenced an action against American challenging this practice as unlawful sex discrimination, in violation of 42 U. S. C. § 2000e, et seq. The complaint asserted that the action was within Rule 23(b)(2), F. R. Civ. P., and that the class consisted of all present and former American stewardesses employed at any time since July 2, 1965, the effective date of the Civil Rights Act of 1964, who had been, desired to be, or would in the future desire to be, pregnant. The complaint sought declaratory, injunctive, and monetary relief. On the same day, ALSSA and five individuals filed a similar action against TWA.

Counsel for ALSSA signed the complaint as attorney for the plaintiffs and conducted the litigation and negotiations for settlement. He did not consult the individual plaintiffs nor any other members of the class concerning the terms of settlement.

By October, 1970, ALSSA and the airlines had made collective bargaining agreements which eliminated the challenged practice prospectively. Thus, although the class defined by the complaints included currently employed stewardesses who, presumably, had an interest in the declaratory and injunctive relief sought, that segment of the class had little further interest in the action, except for such interest as the junior among them would have adverse to the reinstatement of previously discharged stewardesses. Since the currently employed stewardesses were more actively the constituents of ALSSA, the change of circumstances made ALSSA at least a less adequate representative of the remaining members of the class than it may have been considered for the entire original class.

In July, 1971, counsel agreed on a settlement, subject to court approval. The proposed terms required discharged stewardesses who desired re-employment to notify the airline within 60 days from court approval. They would then be placed on a preferential hiring list, to be employed to fill vacancies before others were hired. When offered a job, a stewardess

must accept within 10 days and meet specified standards of physical condition. The airline would have no liability whatsoever to any stewardess who failed, timely, to give the notice of desire to be re-employed or notice of acceptance of an offer. If re-employed, the stewardess would start with the same seniority as she had up to the date of termination, in the case of TWA, or that seniority plus 90 days additional in the case of American. Under the agreement, an order would be entered defining the class, in each case, as all former stewardesses who were removed from the payroll because of pregnancy, between July 2, 1965 and July 31, 1969, in the case of TWA, and August 11, 1970, in the case of American. If approved the settlement and resulting judgment, would bind all members of the class.

It does not appear that the district court made any order concerning the maintenance of these actions as class actions, pursuant to Rule 23(c)(1), until July 16, 1971, after the settlement had been proposed. On that date, the court ordered that the class in each action be redefined in accordance with the settlement agreement, and that the action be maintained as a class action. The order did not expressly address the fulfillment of the prerequisites listed in Rule 23(b) nor of any additional requirement of Rule 23(b). Presumably the court did not consider (b)(3) applicable, as it did not order a notice pursuant to (c)(2).[1] Notices of hearing on approval of the

1. Rule 23(b)(3) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of

At or before the March, 1972, hearing on approval of the settlement, opposition to it was manifested by some of the named plaintiffs and by other members of the class in each action. With some variations, the objectors wanted all, or more nearly all, of the "whole loaf", i.e., reinstatement with seniority accrued to date, and back pay. Several members of the American class, the appellants here in No. 72-1503, had brought their own action July 14, 1971 in the Central District of California. They had attempted to opt out of the instant action, their California action, meanwhile, having been stayed. The district court heard objecting plaintiffs and class members, and their attorneys, only in the capacity of objectors, and in effect recognized ALSSA as the sole representative plaintiff, representing all class members, including the individual named plaintiffs.

The judgments entered as a result of the hearings determined that "Plaintiffs", without distinguishing between ALSSA and other plaintiffs, are adequate representatives of the class settlement were sent out, both in July, after which the hearing was delayed by the appeal, and again the next February.[2]

---

the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Rule 23(c)(2) provides:

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

2. Rule 23(e) requires notice to class members of a proposed settlement. The appellants contest the adequacy and accuracy of the notice procedures used here. In light of our disposition of the balance of the case, we do not reach this issue.

and have adequately represented them; that the action is a Rule 23(b)(2) class action;[3] that the judgment is binding on all members of the class; and that the settlement is fair, reasonable, and adequate for all.

On February 28, 1972, Darlene Preston, a plaintiff in the action against American, above referred to, had brought a new class action against American and ALSSA predicated upon a claim of unlawful discrimination similar to that in the earlier complaint, and upon a claim that ALSSA failed to fulfill its duty of fair representation. Judgment was entered March 20, 1972 dismissing the complaint, apparently on the ground that the claims had been adjudicated by the judgment of March 17, 1972.

1. *ALSSA's Representation of the Class.*

Mr Feldman, counsel for ALSSA, and attorney of record for all the plaintiffs, testified in support of the settlement.

He took into consideration the proposition that the answer to the ultimate question of liability, common to all members of the class, i.e., whether the discharge policy was a violation of the Act, was less than a certainty. He felt that about 90% of the members of the class faced a serious legal question as to recovery because they had been terminated long before any complaint was filed with EEOC and these stewardesses might not be able to rely on the later filing by other members of the class. He noted that the circumstances of termination varied and that these differences might raise questions concerning recovery by members of the class. The airlines had terminated some on

3. Rule 23(b)(2) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or . . . ."

the ground of pregnancy, and others on the ground that they had concealed pregnancy, in violation of a company rule. Others had voluntarily resigned after becoming pregnant, and others resigned, but claimed they were coerced.

Mr. Feldman testified that ALSSA made the decision to agree to the settlement. One advantage was that it afforded an opportunity to every member of the class to return to work, including those against whom the statute of limitations defense might have been urged, as well as those whose claim did not have that problem; those whose termination had clearly been grounded on pregnancy, as well as those who had less clearly been terminated for that cause.

Mr. Feldman conceded that ALSSA had obligations to groups which had conflicting interests. Junior currently employed stewardesses would be harmed by immediate reinstatement of former stewardesses, and the settlement did not provide such reinstatement. Seniority has a very important effect on stewardesses' trip assignments and the like. Thus the former stewardesses who were re-employed pursuant to the settlement would want seniority to accrue during the period they had been out of the job, but the greater the seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage. Mr. Feldman testified that the extent of seniority agreed on represented a compromise of the interests of the various groups.

The airlines said they were unwilling to negotiate concerning back pay. Mr. Feldman conceded that if the matter were litigated and liability established, there would probably be individual members of the class who could establish back pay claims. He estimated that full litigation would consume about five years. ALSSA decided to subordinate the interest of those who wanted to recover money to the interest of those who desired to return to work. This, he said, was an example of bargaining agent responsibility, to resolve in good faith the conflict in interest between groups, both of which are represented by the union.

Rule 23(a)(3) requires that the claims of a representative plaintiff be typical of the claims of the class and (4) requires that the representative plaintiff will fairly and adequately protect the interests of the class. It has been indicated "that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'etre* is to represent the interest of that class."[4] It seems clear, however, that unless ALSSA's status as certified bargaining agent under the Railway Labor Act alters the situation, it cannot, under the circumstances, be treated as the equivalent of a group of former stewardesses terminated on account of pregnancy, and thus members of and adequate representatives of, the class.

ALSSA admittedly considered and to some extent protected the interests of the currently employed stewardesses in working out the settlement. They, who are presently presumably in control of ALSSA, are not members of the class as now defined, and they have antagonistic interests. In *Hansberry* v. *Lee*, 311 U. S. 32, 45 (1940), the Supreme Court held that a judgment in a class action can only bind absent class members where the representative's interests coincide with those of the balance of the class.

Counsel for ALSSA apparently would concede that if ALSSA were deemed merely an association of presently employed stewardesses, or even of both presently and formerly employed stewardesses, it would not be deemed an adequate representative of the class. Counsel argues, however, that ALSSA's role as an exclusive collective bargaining agent for the stewardesses employed by these airlines gives it the power to accommodate and adjust the rights of present and former stewardesses which spring from Title VII, subject only to its obligation of fair representation. If this position were adopted, it need only be

4. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 937 (2d Cir., 1968).

shown that ALSSA acted in good faith and in a manner which could be deemed fair, in making the choices involved in the settlement. Approval of the settlement could then be set aside only if the findings of good faith and fairness were found clearly erroneous.

In *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 200 (1944), the Supreme Court held that the Railway Labor Act, in requiring the carrier to bargain with the chosen representative, operated to exclude any other representative, and deprived minority members of the craft of the right to choose a different representative or to bargain individually as to matters which are properly the subject of collective bargaining. It follows that the representative may make contracts having unfavorable effects on some of those represented, but the representative has "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." A similar holding was reached under the National Labor Relations Act in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 336 (1953).

In *Humphrey* v. *Moore*, 375 U. S. 335 (1963), the Supreme Court dealt with challenges to the resolution of grievances pursuant to a multi-party collective bargaining agreement. At p. 349, the Court said, concerning the antagonistic interests of two groups, that "both groups [were] represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another."

In *Vaca* v. *Sipes*, 386 U. S. 171 (1967), a union member who had been discharged sued the union for its refusal to take the grievance to arbitration under the collective bargaining agreement. The Supreme Court found no evidence of personal

hostility or bad faith on the part of the union officers, and set aside a verdict in favor of the plaintiff. "Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here." p. 194.

Counsel suggests that accommodation of the Railway Labor Act with Title VII of the Civil Rights Act of 1964 requires that the collective bargaining representative be accorded the same power and held to the same degree of duty as the cases just cited accord it in the formulation and administration of collective bargaining agreements and the rights of individual employees thereunder. We are unable to agree.

Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to use that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.

> "The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal Employment Opportunities] Commission." *Air Lines Stewards, etc. Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101, 106 (7th Cir., 1972).

Surely, the fact that a labor organization is defined in 42 U. S. C. § 2000e and made a potential defendant in unlawful

employment practice cases does not, as counsel seems to suggest, indicate an intention on the part of Congress that a collective bargaining representative play a special role in Title VII actions to redress unlawful employment practices by an employer.

We think a union may serve its members by being plaintiff in a suit to vindicate their civil rights. "There is nothing in the law which precluded the Union from recognizing the injustice done to a substantial minority of its members and from moving to correct it." *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711, 719 (7th Cir., 1969). When it espouses the interest of one group of its members, it doubtless has an obligation of fairness to any members whose interesets are in conflict. But except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.[5]

5. See *Cook County College Teachers U., Loc. 1600, A. F. T.* v. *Byrd*, 456 F. 2d 882, 885 (7th Cir., 1972); *Mungin* v. *Florida East Coast Ry. Co.*, 318 F. Supp. 720 (M. D. Fla. ,1970), aff'd 441 F. 2d 728 (5th Cir., 1971), *cert. denied* 404 U. S. 897; *Amalgamated Meat Cutters of No. Am.* v. *Safeway Stores, Inc.*, 52 F. R. D. 373, 375 (D. Kan., 1971). *Amalgamated Meat Cutters* is similar to the present case. There, certain of the defendant's female employees and their union filed a class action alleging that the defendant had failed to pay men and women the same wage for the same work, a violation of 42 U. S. C. § 2000e-5(e). The union and the employer negotiated a compromise and sought the court's approval under rule 23(e). Certain of the class members, including one of the individual named plaintiffs, objected to the compromise as unfair. The district court refused to approve the settlement and ordered independent counsel appointed for the dissenting class members. The court observed that:

> "However, counsel for the plaintiffs has appeared in a dual capacity—that is, both the Union's attorney and attorney for the Class members. It is apparent from the communications in the file, as well as the expressions in open court, that the interests of the Union as a plaintiff, and the interests of at least a portion of the members of the Class are in conflict and not identical." 52 F. R. D. at 375.

2. *The Right of Class Members to Exclude Themselves From the Actions Originally Brought.*

Appellants argue that the district court must offer the members of the class the opportunity to "opt out", or exclude themselves from the class. Rule 23(c)(2) requires that such opportunity, and an alternative opportunity to enter an appearance through counsel, must be afforded in any class action maintained under Rule 23(b)(3). Unless a class action is maintained under Rule 23(b)(3), no right to opt out exists. All members of the class are bound by the judgment.

On July 16, 1971, when the first orders dealing with the actions as class actions were entered, the court did not expressly address the question whether or not they fell under Rule 23(b)(3). In the judgments, the court held they fell under Rule 23(b)(2), thus foreclosing the opportunity of any member of the class to exclude herself.

Rule 23(b)(2) applies to class actions in which

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

When these actions were filed, the class included both stewardesses who had been terminated for pregnancy and those who might in the future be terminated for that cause. The latter were primarily, perhaps solely, interested in a declaration that the practice of termination for that reason is unlawful and an injunction against it. As to that group, (b)(2) would clearly be applicable.

Subdivision (b)(3) applies where:

> "the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy."

All the stewardesses share the common question of whether the discharge-for-pregnancy policy was lawful. Those who had already been discharged were interested in reinstatement with or without back pay, and assuming a favorable decision on the common question, the entitlement of any particular former stewardess to reinstatement, back pay, and accrued seniority would depend on the facts peculiar to her. The amount of back pay would be computed separately for each, and reduced by her interim earnings.[6] Mr. Feldman's testimony shows other differences among individual cases. Some who had not filed with EEOC might have difficulty in establishing that right to rely on the filings of others. The manner and stated cause of termination of employment varied.

As to the discharged stewardesses, the class actions would, even at the beginning, have had to be maintained under (b)(3), with each such stewardess having the right to exclude herself, or appear through counsel.

When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the practice became of little moment. The (b)(3) character of the actions, while always present as to the discharged stewardesses, became even more obvious.

In *Gerstle* v. *Continental Airlines, Inc.*, 50 F. R. D. 213 (D. Colo., 1970), a former stewardess brought a class action, seeking injunctive relief, back pay, and reinstatement for stewardesses terminated because of marriage. The airline had dropped the policy after terminating plaintiff. The court held that in view of the change in policy there was no case for injunctive relief, but that the action should proceed under (b)(3) as to the other types of relief. The present actions are similar.

We have no doubt that even in a class action subject to (b)(3), situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their

6. 42 U. S. C. § 2000e-5(g).

union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and "spoiling" a settlement obtained by such efforts. Nothing revealed in this record puts these cases in that posture.

The actions originally brought against the two airlines should have been, and should henceforth be treated as (b)(3) class actions with the attendant right of a class member, for a reasonable interval, to exclude herself or appear through counsel pursuant to Rule 23(c)(2).

3. *Remand of the Actions Originally Brought Against the Two Airlines.*

On remand, the district court should:

(1) Permit one or more of the named plaintiffs or other members of the class in each action to replace ALSSA as the representative of the class. If it should appear desirable for adequate representation of all class members, subclasses, each with its own representative, may be created.

(2) Require that notices, pursuant to Rule 23(c)(2) be sent, offering to each member of the class the opportunity to exclude herself from the class or appear through counsel.

(3) Proceed with the litigation unless settlement as to some or all issues is agreed on by the appropriate parties, and approved, on notice, by the court.

4. *The Preston Action Brought in February, 1972.*

We express no conclusions with respect to this action except that, since it was dismissed on the theory that the claims therein had been adjudicated by a judgment now being reversed, the judgment dismissing it should also be reversed.

The judgments appealed from are reversed and the causes remanded for further proceedings consistent with this opinion. Circuit Rule 23 shall apply on remand.

APPENDIX III.

RULE 23 OF RULES OF CIVIL PROCEDURE.

Rule 23. Class Actions.

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions

affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe

those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

* * * * *

SEC. 703(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.